

Internal Revenue Service
memorandum

TL-N-4885-89

WHEARD CC:TL:TS

date: JUN 21 1989

to: District Counsel, Kansas City

MW:KAN

from: Assistant District Counsel (Tax Litigation)

CC:TL

subject: [REDACTED]

This memorandum is in response to your request that we review your March 13, 1989, technical advice to your Appeals Office concerning the validity of certain statute extensions on behalf of the partners of [REDACTED], Limited Partnership. While we agree with your ultimate conclusions, we have added additional analysis.

ISSUES

1. Whether a valid power of attorney was executed granting an attorney in fact the power to extend the partnership statute of limitations on behalf of all the partners.
2. Whether extensions signed by the president of the tax matters partner corporation are valid.

CONCLUSIONS

1. Only a power of attorney executed in strict compliance with Temp. Treas. Reg. § 301.6229(b)-1T, is unquestionably valid. It is unresolved whether this is the only way (other than by designating a tax matters partner) in which a partnership may grant the power to extend section 6229(a) on behalf of all partners.

Treas. Reg. § 601.504(b)(1)(iii) provides that either all partners or a partner "duly authorized to act for the partnership" may execute a power of attorney with respect to a partnership. Cf. Treas. Reg. § 601.502(c)(1)(iii) (power of attorney by taxpayer includes power to extend statute of limitations unless specifically excepted). Since these regulations were promulgated before the enactment of TEFRA, it is

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unclear whether an authorization under these provisions constitutes a valid delegation of statute extension authority pursuant to section 6229(b)(1)(B).

We are willing to defend delegations under Treas. Reg. § 601.504(b)(1)(iii) on a Form 2848 which are made by all the general partners, including the authorization by the sole general partner who was also the tax matters partner in the instant case. These types of authorizations, if they do not substantially comply with Temp. Treas. Reg. § 301.6229(b)-1T, are subject to substantial litigation hazards, however, and should be avoided. While not presented in this case, note that we are currently unwilling to defend authorizations by only one of several general partners pending resolution of a test case on this issue before the Tax Court, argued in April.

2. A statute extension signed by the president of a corporation which is the tax matters partner will be valid under section 6229(b)(1)(B). The extension form must specify that the signor is executing the extension in his capacity as president of the corporate tax matters partner. To the extent the signor's capacity is left out or is otherwise ambiguous (as in this case), the extension may be invalid and should be reexecuted to specify the signor's capacity as president of the TMP.

FACTS

The Partnership has one general partner which is a corporation. The general partner is [REDACTED], which was formerly known as [REDACTED]. The corporation is the tax matters partner (TMP).^{1/} [REDACTED] is the president of the corporate general partner and also is a limited partner in his own right, owning a [REDACTED] percent interest in the partnership. On [REDACTED], [REDACTED] (hereinafter "[REDACTED]") filed with the Service a Power of Attorney, Form 2848. When signing this power of attorney form, [REDACTED] indicated his title as president and further indicated that he was signing as president of [REDACTED] and that [REDACTED] was the sole general partner of the Partnership. This power of attorney form named [REDACTED] (hereinafter "[REDACTED]") as the authorized attorney in fact for the partnership and gave

^{1/} We confirmed with Dale Kensinger of your office that the corporation name change was a change in name only rather than the result of a dissolution and/or reorganization. Dissolution or reorganization would terminate the corporation's status as TMP. Temp. Treas. Reg. § 301.6231(a)(7)-1T(1). Mr. Kensinger was aware of no other event, such as bankruptcy, which would have terminated the corporation's status as TMP. See, e.g., Barbados # 7, et al. v. Commissioner, 92 T.C. No. 47 (April 17, 1989).

the addresses and taxpayer identification numbers for [REDACTED] and the partnership. The POA specified that it was effective for the [REDACTED] and [REDACTED] calendar years.

While the above power of attorney was in force, a consent, Form 872-P, was executed extending the statute of limitations for the periods ended [REDACTED] and [REDACTED] (we assume that the Partnership was on a calendar year using a 52-53 week taxable period) to [REDACTED]. This consent contains the signature of [REDACTED] opposite the place on the consent form for the signature of the Tax Matters Partner and does not refer to the corporate sole general partner. The consent also contains the signature of [REDACTED] as the authorized representative of the Partnership.

There is a second power of attorney form, Form 2848, signed by [REDACTED] on [REDACTED], after the above Form 872-P had been executed. This power of attorney form shows that [REDACTED] signed as president but does not indicate the entity of which he was president and an unknown person has written on the form to indicate [REDACTED] was president of the general partner and Tax Matters Partner.

A second consent was executed in [REDACTED] which extends the limitations period to [REDACTED]. On [REDACTED], [REDACTED] executed a second Form 872-P. Opposite the heading "Tax Matters Partner" there is typed on the form the name of the sole corporate general partner who is the TMP. Opposite the line where the authorized representative is to sign, [REDACTED] has signed.

DISCUSSION

Statutory and regulatory authority arguably provide for five potential ways that a partnership may authorize a person to extend the statute of limitations: (1) an authorization executed by all the general partners in conformity with Temp. Treas. Reg. § 301.6229(b)-1T; (2) an authorization by all the general partners on a Form 2848 pursuant to Treas. Reg. § 601.504(b)(1)(iii); (3) an authorization by one of several general partners on a Form 2848 pursuant to Treas. Reg. § 601.504(b)(1)(iii); (4) a delegation by the TMP of his power to extend the statute of limitations as a duly authorized partner pursuant to a Form 2848 under Treas. Reg. § 601.504(b)(1)(iii); (5) the designation by the partnership of a tax matters partner pursuant to I.R.C. § 6231(a)(7) and Temp. Treas. Reg. § 301.6231(a)(7)-1T.

- (1) An authorization executed by all the general partners in conformity with Temp. Treas. Reg. § 301.6229(b)-1T

Extensions of the partnership statute of limitations on behalf of all partners in a partnership are governed by I.R.C. § 6229(b). That section provides as relevant here:

(b) Extension by Agreement.-

(1) In general.- The period described in subsection (a) (including an extension period under this subsection) may be extended . . .

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement), (emphasis supplied)

before the expiration of such period.

Temp. Treas. Reg. § 301.6229(b)-1T provides for the manner in which a partnership can comply with the underlined portion above as follows:

Extension by Agreement.- Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center with which the partnership return is filed. The statement shall--

(a) Provide that it is an authorization for a person other than the tax matters partner to extend the assessment period with respect to all partners,

(b) Identify the partnership and the person being authorized by name, address, and taxpayer identification number,

(c) Specify the partnership taxable year or years for which the authorization is effective, and

(d) Be signed by all persons who were general partners at any time during the year or years for which the authorization is effective.

A delegation by all the general partners in strict compliance with the above regulation which specifically deals with TEFRA partnership statute extension authority will unquestionably be valid.

A delegation which substantially complies with the regulation may also constitute a valid designation. In Taylor v. Commissioner, 67 T.C. 1071, 1077-1078 (1977), the Court set the criteria for substantial compliance:

The critical question to be answered is whether the requirements relate "to the substance or essence of the statute." . . . If so, strict adherence to all statutory and regulatory requirements is a precondition to an effective election. . . . On the other hand, if the requirements are procedural or directory in that they are not of the essence of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. (citations omitted)

Thus, at a minimum, a delegation of statute extension power should be signed by all the general partners for the years for which the authorization is effective, and identify the partnership and authorized person. The delegation should also specify the years for which it is effective. Other requirements of the regulation, e.g., filing with the Service Center where the partnership return was filed (as opposed to handing the authorization to an examination agent), taxpayer identification number, etc., appear to be more procedural in nature and have less to do with the "substance or essence of the statute". Accordingly, the Tax Court could, pursuant to Taylor v. Commissioner, *supra*, find that substantial compliance is sufficient. Cf. Chomp Associates v. Commissioner, 91 T.C. 1069 (1988).

- (2) & (3) An authorization, on a Form 2848 under Treas. Reg. § 601.504(b)(1)(iii), by all the general partners authorized under state law to bind the partnership or by one of several general partners

The crucial distinction between a Form 2848 and the temporary regulation is that the Form 2848 is typically a general power of attorney which does not specifically state that it is an

authorization for a person other than the TMP to extend the statute of limitations on behalf of all partners, as required by the temporary regulation. A delegation is a useless act unless it is to someone other than the TMP since the TMP already has the power pursuant to section 6229(b)(1)(B) to extend the partnership statute. In addition, a general power of attorney includes the power to extend the statute of limitations unless specifically restricted. See Treas. Reg. § 601.502(c)(1)(iii) at fn. 2.

It is unclear whether, in the context of TEFRA, the temporary regulation meant to alter this general rule. Arguably, the requirement that the power of attorney be designated as an authorization for a person other than the TMP to extend the assessment period, is merely for identification purposes or for single purpose powers of attorney rather than a conscious effort to change the law with respect to general powers of attorney. However, to the extent any of the information required by the temporary regulation is left out, litigation hazards will increase that the authorization did not substantially comply with the temporary regulation. It is the office position that we should require complete compliance with the regulation.

To the extent a Form 2848 authorization pursuant to section 601.504(b)(1)(iii) duplicates or substantially complies with the requirements of the above TEFRA temporary regulation, the authorization should be valid. To the extent it may not substantially comply, e.g., it does not specify the years for which it is effective, the Service should seek a new authorization which does comply if the statute of limitations is still open. If the statute of limitations has expired but for a consent executed pursuant to a Form 2848 authorization, the Service may have to rely on sections 601.504(b)(1)(iii), 601.502(c)(1)(iii) and state partnership law.

Treas. Reg. § 601.504(b) provides:

(b) Execution of a power of attorney or a tax information authorization-(1) Ordinary cases. A power of attorney . . . must be executed as follows:

. . . .

(iii) Partnership. In the case of a partnership by all members, or if executed in the name of the partnership, by one of the partners duly authorized to act for the partnership. (emphasis supplied)

A Form 2848 power of attorney on behalf of a taxpayer includes the power to extend the statute of limitations unless this power is specifically reserved. See Treas. Reg. § 601.502(c)(1)(iii).²

General partners typically are "duly authorized" to bind the partnership under state law.³ Thus, to the extent that a Form 2848 is signed by all general partners (e.g., a sole general partner), all partners should be bound. This interpretation is supported by the TEFRA temporary regulation which provides that all general partners together may delegate statute extension authority.

In addition, since all general partners can delegate authority to extend the partnership statute of limitations for all partners, they should also be able to execute the extension themselves directly, e.g., an execution by a sole general partner.

The same result may occur if only one of several general partners executes the Form 2848. However, prior to the time TEFRA was enacted, no partner could extend the period for assessment for other partners. Thus, no state law could have contemplated that a general partner could bind other partners in

² Treas.Reg. § 601.502(c)(1)(iii) provides in part:

Except as otherwise provided . . . a power of attorney in proper form . . . executed by the taxpayer, will be required in a matter by the Revenue Service when the taxpayer's representative desires to perform one of the following acts on behalf of the taxpayer:

. . . .

(iii) Execution of a consent to extend the statutory period for assessment or collection of a tax.

The regulation then states that if the taxpayer wishes to exclude granting authority to perform any specific act including acts for which a power of attorney is required under paragraph (c), language excluding such acts should be inserted in the power of attorney.

³ An authorization signed by all partners under the above regulation (including limited partners) does not depend on the vagaries of state law. See also, I.R.C. § 6229(b)(1)(A) (individual partners authorized to extend statute on their own behalf). However, this situation will rarely, if ever occur.

this respect. As a consequence, it is doubtful as to whether only one of several general partners can authorize a statute extension on behalf of all other partners, especially in light of the fact that the temporary regulation provides that a delegation must be signed by all general partners. Thus, we are currently unwilling to defend delegations by only one of several general partners, pending the outcome of a test case we have authorized on this issue.

(4) Authorization on Form 2848 under Treas. Reg. § 601.504(b)(1)(iii) by the tax matters partner

Under section 6229(b)(1)(B), the tax matters partner is authorized to extend the partnership statute of limitations on behalf of all partners. Thus, under section 601.504(b)(1)(iii), the TMP is "duly authorized to act for the partnership" with respect to statute extensions, and thus, may delegate statute extension authority pursuant to a Form 2848. This interpretation is not free from doubt, however, since the TMP is a creature of federal statute and, as such, it remains unclear as to whether his authority may be delegated.⁴ Nevertheless, we are willing to defend such delegations when it is too late to get a new power of attorney which complies with section 301.6229(b)-1T.

(5) Designation of a TMP

The last way in which a partnership can grant a person the authority to extend the partnership statute on behalf of all partners is to designate a general partner as the TMP for the years in question pursuant to Temp. Treas. Reg. § 301.6231(a)(7)-1T. A TMP is authorized to extend the partnership statute of limitations on behalf of all partners under section 6229(b)(1)(B).

First Power of Attorney Executed [REDACTED]

a. Substantial compliance with Temp. Treas. Reg. § 301.6229(b)-1T

On [REDACTED], [REDACTED], president of the sole general partner and TMP, executed a Form 2848 power of attorney naming [REDACTED] as the attorney in fact for the partnership. A question exists as to whether the Form 2848 "substantially complied" with Temp. Treas. Reg. § 301.6229(b)-1T. Although the Form 2848 was signed by all the general partners for the years in question (i.e., the sole general partner), and specified the

⁴ For instance, the Tax Court comments to T.C. Rule 248(a) state that a stipulated decision document must be signed by the TMP himself rather than by his counsel.

years for which it was applicable, it apparently did not specify that it was an authorization for a person other than the TMP to extend the statute as required by the TEFRA temporary regulation. The issue under the substantial compliance doctrine is whether this element, which was not included on the Form 2848, goes to the substance or essence of the provision or was merely directive and procedural in nature. Taylor v. Commissioner, supra.

As stated above, a delegation is a useless act unless it is to someone other than the TMP since the TMP already has the power pursuant to section 6229(b)(1)(b) to extend the partnership statute. In addition, powers of attorney include the power to extend the period for assessment unless specifically restricted. See Treas. Reg. § 601.502(c)(1)(iii). It is unclear whether, in the context of TEFRA, the temporary regulation meant to alter this general rule, and thus, whether this provision goes to the essence or substance of the regulation. Arguably, this provision is merely for identification purposes and thus, is merely directive in nature. Since no court has addressed these issues, the Form 2848 may or may not have "substantially complied" with Temp. Treas. Reg. § 301.6229(b)-1T.

b. Compliance with Treas. Reg. § 601.504(b)(iii)

It is unresolved as to whether Temp. Treas. Reg. § 301.6229(b)-1T was meant to be the exclusive way in which a partnership could delegate to a person, other than the TMP, the power to extend the partnership statute. An alternative ground for finding that the Form 2848 validly delegated to [REDACTED] the power to execute statutory consents on behalf of the partnership is that the form complied with the requirements of Treas. Reg. § 601.504(b)(iii). Section 601.504(b)(iii) provides that a partner "duly authorized to act for the partnership" may execute a power of attorney on behalf of the partnership. The power of attorney includes the power to extend the statute of limitations unless specifically restricted. See Treas. Reg. § 601.502(c)(1)(iii).

As a general partner, the corporation is authorized under Kansas state law to bind the partnership in all "partnership matters" not specifically excepted. K.S.A. §§ 56-309 and 56-130. Thus, as a general partner under Kansas law, the scope of the corporate partner's power should include matters relating to the extension of the statute of limitations unless this power is specifically reserved in the certificate of limited partnership or partnership agreement. Id.⁵

⁵ Cf. Barbados # 7 Ltd. v. Commissioner, 92 T.C. No. 47 (April 17, 1989) (Under Utah state law, where partnership has dissolved due to bankruptcy of general partner, former general partner has no authority to bind partnership).

Furthermore, the sole general partner in this case constitutes "all the general partners" within the meaning of Temp. Treas. Reg. § 301.6229(b)-1T, and as such, may be generally authorized under this federal regulation to delegate statute extension authority.

Finally, the corporation, as tax matters partner, is also authorized under section 6229(b)(1)(B) to extend the statute of limitations on behalf of all partners. Thus, it may be "duly authorized", within the meaning of section 601.504(b)(1)(iii), to grant this power to an attorney in fact. This is not completely free from doubt, however, since the TMP is a creature of statute and no court has of yet addressed whether the TMP's statutorily created power can be delegated. But see Temp. Treas. Reg. § 301.6231(a)(7)-1T(d) (TMP can certify designation of successor TMP).

Thus, the sole general partner in this case may have validly designated [REDACTED] as an attorney in fact with power to extend the partnership statute of limitations on behalf of all partners under section 601.504(b)(1)(iii) because the sole general partner was "duly authorized" to delegate statute extension authority under (1) Kansas state law, (2) Temp. Treas. Reg. § 301.6229(b)-1T, and (3) as the tax matters partner. The delegation may also be valid because it substantially complied with Temp. Treas. Reg. § 301.6229(b)-1T. Litigation hazards exist with respect to these conclusions, however.

First Form 872-P

a. Executed by attorney in fact

While the above Form 2848 was in force, [REDACTED] executed a statute extension (Form 872-P) on behalf of all partners as the authorized representative of the partnership. Since the partnership probably delegated to [REDACTED] the power to extend the statute based on the four alternative grounds raised in the preceding paragraph, the Form 872-P may have been executed pursuant to a valid Form 2848 power of attorney.

b. Also executed by TMP and sole general partner

As an alternative ground, the Form 872-P was also signed by [REDACTED], president of the TMP, on the signature line for the TMP. The TMP is specifically authorized under section 6229(b)(1)(B) to execute an extension on behalf of all partners. [REDACTED]'s capacity as president of the TMP was not specified, however. Since [REDACTED] is not the TMP, his signature may have no effect. See Computer Programs Lambda, Ltd. v. Commissioner, 89

T.C. 198 (1987) (Petition by individual as TMP did not constitute a valid partnership petition because the petition did not specify that he was filing on behalf of corporate TMP as its president).

Since it is possible that [REDACTED] intended to sign as president of the TMP, however, this may be a valid TMP extension. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985) (Failure of corporate president to include corporation's name on waiver deemed mere clerical error); Three G Trading Corp., Transferror, T.C. Memo. 1988-131 (Burden on petitioner to prove that he did not intend to sign in his corporate capacity). Note that, as a limited partner in his individual capacity, [REDACTED] could not be TMP himself unless the Service designated him as such when no general partner was available. PAE Enterprises v. Commissioner, T.C. Memo. 1988-222; I.R.C. § 6231(a)(7)(B); Rev. Proc. 88-16, 1988-1 C.B. 691.

A third ground exists. If all of the general partners can authorize a person to extend the statute of limitations under Temp. Treas. Reg. § 301.6229(b)-1T or Treas. Reg. § 601.504(b), then it is apparent that all of the general partners could execute the statute extension themselves rather than delegate this authority. Thus, [REDACTED] could sign an extension as the president of the sole general partner. This argument is subject to the same defense as in the preceding paragraph, i.e., that [REDACTED] did not sign in his capacity of president of the sole general partner.

In summary, this first Form 872-P may be valid since [REDACTED] executed the form under a power of attorney and because [REDACTED] may have intended to execute the form on behalf of the corporate TMP and sole general partner. All three of these grounds are subject to litigation hazards.

Second Power of Attorney Irrelevant

After the first 870-P was executed, a second power of attorney was executed by [REDACTED] on [REDACTED], which operated to revoke the earlier power of attorney. Since the first Form 872-P had already been executed at this time, however, this second power of attorney had no adverse consequences on the first Form 872-P. Since the second Form 872-P (discussed infra) was not executed under this power of attorney but was executed by the TMP, this second power of attorney is apparently irrelevant for all purposes.

Second Form 872-P

a. Improper execution by TMP

In [REDACTED], [REDACTED] executed a second Form 872-P. Opposite the heading "Tax Matters Partner" there is typed on the form the name of the sole corporate general partner who is the TMP. Opposite the line where the authorized representative is to sign, [REDACTED] has signed as authorized representative. Although it appears that [REDACTED] intended to sign as the president of the general partner, the form is inherently ambiguous. [REDACTED] has signed as the authorized representative. Yet [REDACTED] is not the authorized representative in the sense that he is acting under a power of attorney form. Although the Court would probably find this to be a mere clerical error, we agree that the consent should be re-executed with [REDACTED] signing opposite the term Tax Matters Partner with the further notation that [REDACTED] is signing as president of the corporate TMP.

CONCLUSION

Subject to substantial litigation hazards, as noted above, we conclude that the first Form 872-P is valid since it was executed pursuant to a valid authorization and was also signed by the president of the tax matters partner. Thus, the partnership statute of limitations will be held open until [REDACTED], and an notice of final partnership administrative adjustment issued by this date will be valid.

The second Form 872-P is also probably valid since the intent of [REDACTED] was to sign as president of the tax matters partner. Since the form itself is ambiguous, however, a new Form 872-P should be executed by [REDACTED], or a notice of final partnership administrative adjustment issued by this date.

Please refer any questions you may have to Bill Heard at FTS 566-3233.

MARLENE GROSS

By:

Kathleen E. Whatley
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